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LEGAL BRIEF

Where the buck stops

While ASIC is happy to tell us where to invest our tax return, there is an irony in the fact that the ATO refuses to answer questions about our self-funded super funds.

Is it general advice when the Australian Securities and Investments Commission suggests that taxpayers use a personal tax refund to top up their superannuation? Is ASIC licensed to make such a recommendation? Or is this a case of do as I say, not as I do?

Recently, Delia Rickard, ASIC's deputy executive director of consumer protection, expressed the recommendation that individuals should use their tax refund to not only make an additional contribution to their super fund but also to consider extra payments to their credit card, personal or car loan, or even their mortgage.

Was this financial product advice? Using the language of section 766B, did Rickard make a recommendation or a statement of opinion that was intended to influence a person or persons in making a decision in relation to a class of financial products or could reasonably be regarded as being intended to have such an influence?

Before anyone gets too carried away, I accept that some may say that ASIC should not make such comments. ASIC's actions in the market must be well beyond reproach, but common sense needs to prevail every now and then. Rickard should be praised for what she said; hers was sound and practical advice.

I also recently read with interest that Equisuper, a Victorian-based industry super fund with assets of more than \$3.3 billion, has urged the government to amend the sole purpose test so as to enable a member's superannuation account to be used to finance retirement advice. Like the ASIC comment, there is a great deal of merit in this suggestion. However, to make this plan succeed, an amendment to the taxation laws would also be required to make the payment of the member's personal financial advice tax deductible to the fund.

Is there some planetary alignment affecting the thinking of some? ASIC promoting personal superannuation saving and an industry super fund encouraging access to paid financial advice – a brave new world of common ideals may be emerging.

While bouquets must be awarded to Rickard and Equisuper, a brickbat must be shot squarely between the eyes of the Australian Taxation Office and its attitude of refusing to provide private and binding advice to the trustees of self-managed superannuation funds (SMSFs).

Despite Peter Costello's proclamation that his 2006 budget will render financial planning redundant, there is still a universal belief in the complexity of Australia's retirement savings system.

Since 1999, the ATO has taken control of the prudential regulation of SMSFs. In that time the number of funds have more than doubled. The average value of an SMSF is around \$660,000. The SMSF sector of Australia's retirement savings represents more than \$210 billion and is second in size only to retail funds. The value of it exceeds that of government and industry funds.

Yet the law guarantees that this vast wealth is managed by amateurs. Section 17A of the Superannuation Industry (Supervision) Act effectively requires all members of a SMSF to be trustees or directors of the trustee company. That is, ordinary people from ordinary walks of life personally managing and responsible for an average \$660,000 of their retirement future. And the ATO now guarantees that they will not provide any of them with private and binding ruling support where it is needed.

ALL RESPONSIBILITY, NO CARE

The system of private and binding rulings was first introduced in 1992 as a counterbalance to the increased responsibility on taxpayers under self-assessment. Its purpose was to enable a taxpayer to obtain direction from the ATO about a particular matter in the knowledge that the ATO would be bound by whatever it said.

Recently, I had cause to ask the ATO for a private and binding ruling on a superannuation investment-related issue. The ATO refused.

What disturbs me is that there are hundreds of thousands of amateurs running their own superannuation funds who, from time to time, need advice. Why doesn't the ATO fulfil this role?

Since 1999 the ATO has had responsibility for the prudential management and regulation of SMSFs. When will they learn that with this responsibility comes an obligation to teach, educate and provide direction when requested?

In reply to my concern that the ATO would not rule on a potentially complex investment issue I was advised: *"Whilst we appreciate your concerns in relation to this issue ... section 357-55 of Schedule 1 of the Taxation Administration Act 1953 currently sets out the scope of the legally binding ruling regime that applies to certain law administered by the Commissioner of Taxation. This regime does not extend to the Superannuation Industry (Supervision) Act 1993 (the SIS Act)."*

So the law prohibits the ATO from private and binding rulings, but can't they give certainty anyway?

"The Tax Office guidelines on provision of advice are set out in Law Administration Practice Statement PS LA 2001/4 which is available on our website www.ato.gov.au. This Practice Statement provides an exhaustive list of issues on which the Commissioner will give advice that he will treat himself as being administratively bound by. This Practice Statement is primarily focused on issues of liability and the impact and consequences of advice in respect of liabilities to the Commonwealth. The SIS Act is not included on that list and therefore only general advice can be provided by Tax officers about these issues."

This is unacceptable. The truth is that any question involving an SIS Act or regulation issue has tax consequences. If a trustee of an



SMSF engages in an investment activity or otherwise interprets the myriad rules that applies to it in a way which displeases the ATO, under Section 42A, the ATO can remove its complying status. Tax is the consequence of this? Instead of being taxed under Division 3 of Part IX of the Income Tax Assessment Act, 1936, the superannuation fund will suffer three times the taxation under Division 4. With Section 288A applying, in many cases almost half of the superannuation fund will be lost to taxation.

PROSECUTOR AND JUDGE

If these are not tax consequences sufficient to support an application for a private and binding ruling then I am afraid there's something that I'm missing.

There needs to be an urgent Senate inquiry into why the ATO is not willing to provide a private and binding ruling support in what is perhaps the most complex area of law that ordinary Australians will ever come to face.

It can't be that the ATO does not know how to answer the questions. If this is the case, then sack it as the regulator. The most recent statement by the ATO on a superannuation prudential matter is the July 2006 ATO Interpretative Decision 2006/226. This statement proves

to me that the ATO has the skill and the capacity. Apparently it just lacks the belief in its powers – or the willingness.

The ATO admits that it has power to rule on tax matters. I framed my question as one that asked whether the SMSF would be taxed under Division 3 (because it was a complying fund) or under Division 4 (because it was no longer a complying fund due to the planned investment strategy that was the subject of the request for advice). I know that the ATO had to form an SIS Act conclusion to answer my tax question but it has refused to do so. It argued that it is really an SIS Act question and they are not empowered to answer this.

This is wrong. The ATO has the skill and capacity to do it. The ATO will certainly rule on an SIS Act issue if it feels the rules have been broken and when doing this, it will collect almost half of the infringing superannuation fund assets in taxation. It is the regulator of SMSFs. It is the prosecutor and judge. But it will not provide an assured guidance to amateur trustees who need it most. This is wrong.

Will the ATO learn from the mistakes of the 1990s, or will it need another Senate inquiry before it accepts being pushed into providing real support? There is the urgent need for the ATO to be required to provide private and binding rulings to the trustees of SMSFs, to the benefit of the people who need this guidance the most ... you. **Asset**